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Federal Communications Commission

DA 99-1839

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-216
Table of Allotments,)	RM-9153
FM Broadcast Stations.)	
(Berlin and North Conway, New Hampshire))	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 8, 1999

Released: September 10, 1999

By the Chief, Allocations Branch:

1. At the request of Fuller-Jeffrey Radio of New England, Inc. (formerly Fuller-Jeffrey Broadcasting Corporation of Greater Des Moines) ("petitioner"), the Commission has before it the Notice of Proposed Rule Making, 12 FCC Rcd 16403 (1997), proposing the reallocation of Channel 279C from Berlin to North Conway, New Hampshire, as the community's first local aural transmission service, and the modification of Station WPKQ's license to specify North Conway as its community of license. Comments were filed by the petitioner reiterating its intention to apply for Channel 279C, if reallocated to North Conway.¹

2. The proposed reallocation of Channel 279C from Berlin to North Conway was filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New

¹ In response to the Notice, comments were also filed by Tyler P. Harwell ("Harwell"). However, Harwell's comments were late-filed, with no explanation for their lateness or request for their acceptance. In response to petitioner's reply comments opposing the acceptance of Harwell's comments, Harwell filed a "Reply in Tertio" stating that the lateness should be forgiven since there was no notice given to the community of the pendency of the proposal and thus he was unaware of the proposed relocation of Station WPKQ in sufficient time as to timely submit comments. Section 1.415 of the Commission's Rules provide that comments in rule making proceedings ordinarily may not be filed after the deadline specified in the Notice of Proposed Rule Making and Section 1.46 states that such deadlines may be expended only upon a showing that an emergency situation prevented the filing of timely comments. We find that Harwell has not shown a sufficient justification to allow acceptance of his late-filed comments and thus will not be considered herein. Further, based on this finding, petitioner's reply comments in response to Harwell's comments and "Reply in Tertio" are moot and will not be discussed. See, Amor Family Broadcasting Group v. FCC, 918 F. 2d 960 (D.C. Cir. (1990) (Court affirms rejection of comments in support of a Notice that were late-filed), and Hazlehurst and Bude, MS, 10 FCC Rcd 2164 (1995) (Commission staff rejects late-filed supporting comments and associated expression of interest which were accompanied by a motion for leave to accept the late filed pleading).

Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990).

3. As stated in the Notice, North Conway is listed in the 1990 U.S. Census as a Census Designated Place ("CDP") and attributed with a population of 2,032 persons. North Conway has its own post office and zip code, as well as local police and fire departments, library, Settlers' Green Shopping Center as well as other businesses, such as the Scottish Lion Import Shop, Inc., the North Conway Community Center, a Masonic Temple, medical services, and a number of churches. Berlin, with a 1990 U.S. Census population of 11,824 persons, receives local aural service from AM Station WMOU as well as Station WPKQ.

4. Station WPKQ is a grandfathered short-spaced station with respect to Station WKNE, Channel 279B, Keene, New Hampshire. As set forth in the Notice, Section 1.420(i) of the Commission's Rules does not specifically address situations involving grandfathered short-spaced stations such as Station WPKQ. The Commission previously found that the public interest was served by considering waiving strict compliance with the spacing requirements where no new short-spacings were created, existing ones were not exacerbated and the potential for increased interference between the currently short-spaced stations was not increased. See, Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992). However, recognizing that Section 1.420(i) of the Commission's Rules does not specifically address such grandfathered short-spaced station, the Notice requested whether a waiver of the spacing requirements would be appropriate in this instance in view of the magnitude (112 kilometers) of the short-spacing to Station WKNE at Keene, New Hampshire.

5. In response, petitioner states that to deny the proposal would be a "fruitless frustration" of the public interest, with no beneficiary. Since WKNE would not benefit from a denial of its proposal, petitioner states that the failure to waive the spacing requirements in this instance would only serve to deny North Conway of its first local aural service.

6. We believe the public interest would be served by reallocating Channel 279C from Berlin to North Conway, since it could provide the community with its first local aural service, which is a higher allotment priority than the allotment of a second local aural service at Berlin². We believe that a waiver of Section 73.207 is warranted since there is no change in Station WPKQ's technical facilities and thus the short-spacings, and any attendant interference, which already exist will not worsen. Channel 279C can be allotted to North Conway at Station WPKQ's presently licensed transmitter site, which is 27.9 kilometers (17.3 miles) northwest of North Conway.³ In implementing this change of community of license, the petitioner must propose the

² The allotment priorities are: (1) first aural service; (2) second aural service; (3) first local service; and (4) other public interest matters. Priorities (2) and (3) are given co-equal weight. See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).

³ The coordinates for Channel 279C at North Conway are 44-16-14 North Latitude and 71-18-15 West Longitude.

existing Station WPKQ transmitter site. While North Conway is located within 320 kilometers of the U.S.-Canadian border, prior Canadian approval of the change in community is not required because no change in transmitter site or facilities is proposed. However, as a result of our decision herein, we will notify the Canadian government of the change to the Table of Allotments to reflect the deletion of Channel 279C at Berlin and its reallocation to North Conway. In accordance with Section 1.420(i), we will also modify petitioner's license for Station WPKQ to specify North Conway as its community of license.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective October 25, 1999, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Berlin, New Hampshire	--
North Conway, New Hampshire	279C

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Fuller-Jeffrey Radio of New England, Inc., for Station WPKQ, IS MODIFIED to specify North Conway, New Hampshire, in lieu of Berlin, New Hampshire, as its community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301) specifying the new facilities at its currently authorized site, at coordinates 44-16-14 North Latitude and 71-18-15 West Longitude.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

**John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau**